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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ROY MILLER et al., Plaintiffs and Appellants, v. MARCUS DANIEL MERCHASIN et al., Defendants and Respondents.	A149492 (San Francisco County Super. Ct. No. CGC-12-518354)

During a bench trial on a single cause of action for malicious prosecution, the trial court entered a judgment after the close of the plaintiff's evidence pursuant to Code of Civil Procedure section 631.8[1] in favor of defendants Marcus Daniel Merchasin, The Law Office of Marcus Daniel Merchasin, William Hedden and Consolidated Adjusting, Inc. (collectively, "defendants"). Plaintiffs Roy Miller, Mario Galande and Miller-Galande Antiques (collectively, "plaintiffs") appeal. They contend the trial court was mistaken in finding they had not carried their burden of proving the elements of favorable termination of the prior proceeding, lack of probable cause to bring the prior proceeding and malice. We need only address the last element and, finding no reversible error in the trial court's determination that malice was not proven, affirm the judgment.

[1] Code of Civil Procedure section 631.8, subdivision (a) provides in relevant part, "After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party. . . ."

I. BACKGROUND

Prior to the events giving rise to this action, Miller and Galande lived and operated their business, Miller–Galande Antiques, in a 3 unit residential property they owned at 1056–1060 Potrero Avenue in San Francisco (the property). On December 31, 1996, there was a fire on the property when Miller attempted to fill a kerosene lantern.

On January 2, 1997, plaintiffs were approached by a representative of Consolidated, an independent insurance adjusting company owned by defendant Hedden. They retained Consolidated to negotiate on their behalf with their insurance company regarding their claim for fire-related losses. Consolidated was to receive 10 percent of the insurance payment on the claim.

Plaintiffs were in dire financial straits, and Consolidated advanced them a total of $7,000 against their insurance recovery. They signed a promissory note on April 8, 1997, but they paid back only $1,500. In November 1997, frustrated by the delays in the settlement, plaintiffs terminated Consolidated and hired an attorney who, in April 1998, settled their insurance claim for $163,230.

Hedden went to see an attorney, Merchasin, to see if he could collect money he believed he was owed for his services. Merchasin agreed to represent Hedden and Consolidated. Merchasin attempted to reach plaintiffs at one of the units that had been damaged by the fire and also wrote the insurance company, but he received no response. There was evidence that plaintiffs were no longer at the same address (in the building that burned), although they did not use a different address in their correspondence and received mail from their attorney that was addressed to that address.

In April 1999, Merchasin filed a lawsuit against plaintiffs on Consolidated's behalf, seeking the unpaid 10 percent commission, repayment of the money loaned, and an "alternative" prayer for relief for $1 million. Hedden authorized Merchasin to file the complaint. After failed attempts to personally serve respondents, Consolidated effected substituted service on plaintiffs. Shortly after this substituted service, Consolidated propounded several discovery requests, mailing them to the same address used for service, and including one that sought an admission from plaintiffs "that you owe

Consolidated Adjusting, Inc. [$1 million]." The discovery requests sought the additional admission "that [Consolidated] is entitled to judgment in this matter in the sum of [$1 million]."

In December 1999, after respondents had neither filed an answer, responded to discovery, nor otherwise appeared in the action, Consolidated sought, and obtained, a court order deeming admitted the unresponded to requests for admission. Consolidated then requested and received an entry of default and, on June 5, 2000, a default judgment for that amount. Hedden was a little surprised by the judgment but did not ask Merchasin to take action to change the amount.

Consolidated presented the June 2000 judgment to the Lynch Gilardi Law Firm, which controlled the trustee account holding the disputed 10 percent of the insurance settlement. In July 2000, the law firm released $16,323 to Consolidated. In July 2001, Consolidated recorded an abstract of judgment with the San Francisco Assessor–Recorder on the real property owned by plaintiffs, thus effecting a lien of $1 million on the property.

In May 2003, plaintiffs moved to vacate the $1 million default judgment, but the case was stayed prior to a ruling on the motion because, in November 2000, Miller had filed for bankruptcy. In 2009, after the bankruptcy proceedings concluded, the trial court vacated the default judgment finding improper service. The litigation recommenced, and a bench trial was held in April 2010. Judgment for respondents was entered in March 2011, stating that Consolidated "shall take nothing by reason of [its] Complaint" and awarding costs to plaintiffs. Consolidated was not required to disgorge the $16,323 it had received from the Lynch Gilardi Law Firm, which plaintiffs (the defendants in the underlying action) had argued was a global settlement of all claims by Consolidated including the monies advanced. The court noted in its statement of decision that the money loaned by Consolidated to plaintiffs violated Insurance Code section 15028, subdivision (c), which prohibits advancing money to any potential client to obtain business.

In February 2012, plaintiffs filed the instant lawsuit. The complaint alleges a claim for malicious prosecution because Consolidated, Hedden and Merchasin "filed the [underlying lawsuit] claiming damages of [$1 million] when in actuality their damages were less than [$30,000]." The complaint also included additional causes of action.

The defendants filed an anti-SLAPP motion (Code Civ. Proc., § 425.16) challenging the complaint in its entirety. The trial court granted the motion in part and struck all but the malicious prosecution claim. With respect to that claim, it found "sufficient evidence from which a trier of fact could conclude that [defendants] filed and prosecuted a lawsuit against [plaintiffs] that, even if supported by probable cause as to some amount, was entirely lacking in probable cause and pursued maliciously as to the amount actually sought by [defendants]." This Court affirmed. (*Miller v. Merchasin* (Oct. 4, 2013, A136330) [nonpub. opn.].)

The case proceeded to a bench trial on the malicious prosecution claim. In addition to evidence of facts recited above, the court heard testimony from Miller, which included a description about how Hedden twice suggested to plaintiffs that they sign over the property to Consolidated: Once when Miller and Galande met with Hedden and Hedden asked them to sign a promissory note for the money advanced, and once when they received a $10,000 check from the insurance company for losses under the lost business profits portion of the policy. Miller testified that he was shocked when Hedden wanted repayment of the loan and a promissory note. Hedden testified that he met with Galande alone on the occasions testified to by Miller and that Miller was not even present.

Merchasin, called as an adverse witness for plaintiffs under Evidence Code section 776, testified that he represented Consolidated in the underlying action free of charge because Hedden had such a good reputation in the community. Hedden did not participate in the drafting of any legal documents or in the formulation of the theories of recovery. Merchasin thought at the time he filed the initial action that the settlement between plaintiffs and the insurance company (of which Consolidated believed it was entitled to 10 percent) might include damages for bad faith, which could be quite high. It

was not until 2010, about a month before the trial in the underlying case, that Merchasin learned of the actual amount of the settlement between plaintiffs and their insurance company.

When he prepared the complaint in this case, Merchasin used standardized language he had received at a seminar. The speaker at the seminar had talked about damages when you couldn't reach someone: "You better put a Prayer in there that can cover you in the situation where you don't want to find your client in the spot of receiving $25,000 when the real damage is [$]100,000 and you couldn't serve the guy." Plaintiffs would not respond to the lawsuit and would not provide any details about their settlement with the insurance company. Nor would the insurance company or the lawyer who represented plaintiffs.

Merchasin testified that the court deemed admitted the requests for admissions (which included a request that plaintiffs admit liability in the amount of $1 million) as a discovery sanction. He filed the request for default because the court "wanted this case hurried down the path" and sent out an order to show cause as to why they had not taken a default when plaintiffs had not appeared. He obtained a default and set the matter for a prove-up hearing because "we wanted to get this past the clerk's office and discuss it with" the judge, but the judge had "other ideas" and signed a judgment in the amount of $1 million because of the discovery sanction, in which plaintiffs were deemed to have admitted owing defendants that amount. Merchasin filed the abstract of judgment to "[p]ut the world on notice that there was a claim." He did not want plaintiffs' house because "[t]o acquire the house means you have to assume responsibility, liability, insurance, fix it up, do a whole bunch of things. Consolidated Adjusting merely wanted its claim resolved." The insurance company and the plaintiffs "kept [him] in the dark" until he learned of the settlement terms in 2010.

The court found that plaintiffs had failed to prove that the underlying lawsuit was terminated in their favor, that it was brought or continued without probable case, or that any defendant acted with malice. It granted a motion for judgment in favor of defendants (Code Civ. Proc., § 631.8) and issued a statement of decision that stated in part:

"Plaintiffs invite[d] the court to view the case as follows: Plaintiffs, in a vulnerable and in a hard pressed condition, sustained fire loss and placed their insurance claim in the hands of public adjustor Consolidated. From the beginning, Consolidated tried in effect to steal their home away from them. Although Consolidated loaned funds to the plaintiffs to help them through hard times, they were shocked when Consolidated sought evidence of that indebtedness through execution of a promissory note. Consolidated (through the actions of Hedden) asked them to consider solving their problems by signing over their home and all insurance proceeds to them. Long after Consolidated was terminated, plaintiffs claim that it initiated a lawsuit against them, falsely sought a 'Million Dollar Judgment' against them, and long after obtaining a default judgment, recorded an abstract of judgment.

"Plaintiffs claim that they were shocked to learn of the abstract (even though there is evidence that they learned of the judgment earlier through knowledge of a cost bill), and hired an attorney for the sole purpose of 'getting the cloud off the title.' The story is more elaborate, but no material disputed fact essential to advancement of their claim has been proved.

"One repeated theme in plaintiffs' case is that Consolidated and Merchasin, all to advance their nefarious plan to steal plaintiffs' real property, served process, discovery. . .and all documents. . .to an address that they knew to be false. [That] is not credible. The documents were served on the address that Miller and Galande wrote on the official notice of termination that they delivered to Consolidated. That is the same address that they provided to the San Francisco Bar Association, an address that their successor attorney Joseph C. Barton relied [upon] in sending his own communications. . . . The testimony of Merchasin and Barton was that their communications sent to plaintiffs' address of record was never returned. The court finds no part of plaintiffs' evidence on this point credible.

"The testimony of Messrs. Hedden and Merchasin was unimpeached. Counsel for plaintiffs asked a question which invited Mr. Merchasin to attest to his opinion of Mr.

Hedden's good character and his good reputation in the community for same, and that testimony is convincing."

The court found that The Law Offices of Marcus Daniel Merchasin was not a proper party, because Merchasin was a sole practitioner who had already been named in the lawsuit. It also entered judgment in favor of Hedden on the independent ground that he was not a party to the underlying case and that he did not actively participate in the conduct giving rise to this suit. (See also *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 53–55 (*Bertero*); *Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 114 [advice of counsel may be a complete affirmative defense to malicious prosecution claim so long as client acts in good faith].) Plaintiffs do not challenge these aspects of the order on appeal.

II. DISCUSSION

A. *Motion for Judgment under Code of Civil Procedure section 631.8*

" ' "The standard of review after a trial court issues judgment pursuant to Code of Civil Procedure section 631.8 is the same as if the court had rendered judgment after a completed trial—that is, in reviewing the questions of fact decided by the trial court, the substantial evidence rule applies." ' " (*Orange County Water Dist. v. MAG Aerospace Industries, Inc.* (2017) 12 Cal.App.5th 229, 239 (*Orange County*).) " 'Because the trial court evaluates the evidence as a trier of fact, it may refuse to believe some witnesses while crediting the testimony of others.' " (*Medrazo v. Honda of North Hollywood* (2012) 205 Cal.App.4th 1, 10.) We review questions of law de novo. (*Orange County*, at p. 240.)

A court acting as the trier of fact may enter judgment in favor of the defendant if it concludes the plaintiff failed to satisfy his burden of proof. (*Orange County, supra,* 233 Cal.App.4th at p. 239.) "On appeal '[w]e resolve all evidentiary conflicts in favor of the prevailing parties, and indulge all reasonable inferences possible to uphold the trial court's findings. [Citation.] . . . This court is without power to substitute its deductions for those of the trial court when the trial court could reasonably deduce two or more inferences from the facts.' " (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 731

(*Eriksson*).) However, the ordinary standard of substantial evidence can be "misleading" in cases where the judgment for one party is based on the failure of the other to satisfy the burden of proof. (*Id*. at p. 732.)

"When, for example, the plaintiff has the burden of proving the elements of his claim and the court finds he has failed to satisfy that burden, judgment will be for the defendant—even if there is no evidence supporting the defense. There being *no* evidence for the defense, there could be no *substantial* evidence in the record to support the judgment. Yet, the plaintiff, who failed to prove his case, would clearly not be entitled to reversal of the defense judgment. Plainly, the substantial evidence standard, as it is usually stated, is an inadequate appellate tool in that situation. [¶] Thus, '[w]hen the trier of fact has expressly or implicitly concluded that the party with the burden of proof failed to carry that burden and that party appeals . . . the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." ' " (*Eriksson, supra*, 233 CalApp.4th at pp. 732–733, citing *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 279.)

B. *Malicious Prosecution*

" 'Malicious prosecution is a disfavored action. [Citations.] This is due to the principles that favor open access to the courts for the redress of grievances.' " (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 493 (*Downey Venture*).) "[T]he elements of the [malicious prosecution] tort have historically been carefully circumscribed so that litigants with potentially valid claims will not be deterred from bringing their claims to court by the prospect of a subsequent malicious prosecution claim." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872 (*Sheldon Appel*).)

"To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the

direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations]." (*Bertero*, *supra*, 13 Cal.3d at p. 50.) "The plaintiff in a malicious prosecution action must prove each of the necessary elements of the tort." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164 (*Sangster*).) Favorable termination and lack of probable cause are questions of law, which we review de novo, unless there is a dispute as to the facts on which the determination depends. (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1149, 1154 (*Sierra Club*).) Any such factual issues are threshold questions that must be determined by the trier of fact before the court may reach the legal issue; factual issues are reviewed for substantial evidence. (*Id*. at p. 1154; *Sheldon Appel*, *supra*, 47 Cal.3d at p. 868.) Malice is also a question of fact, subject to substantial evidence review. (*Sheldon Appel Co.*, at p. 875.)

C. *Analysis*

Plaintiffs argue the court should not have granted judgment in favor of defendants, arguing that each element of malicious prosecution was met in this case. Even if we assume, for the sake of argument, that plaintiffs proved that there was a favorable termination of the prior suit as well as a lack of probable cause to bring it or continue litigating it after Consolidated received the equivalent of a 10 percent commission (see *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970), plaintiffs have not demonstrated the element of malice as a matter of law. (*Eriksson*, *supra*, 233 Cal.App.4th at p. 734.)

"The 'malice' element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant acted in initiating the prior action." (*Sheldon Appel Co.*, *supra*, 47 Cal.3d at p. 874; *Downey Venture*, *supra*, 66 Cal.App.4th at p. 494.) Case law has established that a malicious prosecution plaintiff must plead and prove actual ill will, some ulterior motive, or that the proceeding was initiated for an improper purpose. (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1407.) Generally, malice is established by circumstantial evidence and inferences drawn from the evidence. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 675.) The absence of probable cause will support an inference of malice, but lack of probable

cause is not sufficient by itself. (*Ibid.*) The presence of malice must be established by additional evidence. (*Downey Venture*, at pp. 498–499 & fn. 29.)

As noted, malice is present when proceedings are initiated for an improper purpose. (*Sierra Club*, *supra*, 72 Cal.App.4th at p. 1157.) "Suits with the hallmark of an improper purpose" include "those in which: ' ". . . (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim." ' " (Ibid.)

Plaintiff argues that the defendants presented sufficient evidence of malice to prevail. Their briefing on this point consists largely of arguments about the facts that would support a finding of malice: the prayer for $1 million, the obtaining of a $1 million default judgment that was set aside, facts suggesting that documents from the prior litigation were served at the wrong address, and plaintiff Miller's testimony that Hedden suggested transferring the property and all future insurance proceeds over to him. They argue that while defendants had probable cause to bring a collection action based on the retainer agreement, once the ten percent commission was paid, they lacked probable cause to proceed with the underlying action and acted with malice when they nonetheless enforced the default judgment against the property.

This is certainly one view of the evidence. But "issues of fact and credibility are the province of the trial court," and "[w]e do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court." (*In re I.J.* (2013) 56 Cal.4th 766, 773.) The appellate court begins with the presumption that the judgment is supported by substantial evidence. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) The appealing parties have the burden of demonstrating error. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) They must "convince the court, by stating the law and calling relevant portions of the record to the

court's attention," that the judgment is incorrect. (*Culbertson v. R.D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710.)

The trial court, sitting as the trier of fact, made a factual call that plaintiffs' version of the evidence was untenable and they failed to prove defendants acted with malice. Merchasin's testimony supports the view that defendants pursued the underlying action only because they wanted to protect the rights of Consolidated and collect the commission to which it believed it was entitled, not because they harbored malice. Even if the record would have supported a finding of malice in the first instance, we cannot say the trial court's finding to the contrary was erroneous. Regardless of whether this court would have ruled differently, the evidence of malice was not " 'uncontradicted and unimpeached' " or " 'of such a character and weight as to leave no room for a judicial determination that [the evidence] was insufficient to support a finding.' " (*Eriksson, supra,* 233 CalApp.4th at pp. 733.)

Plaintiffs contend that defendants are estopped from denying the element of malice under the doctrines of res judicata and collateral estoppel by virtue of the final judgment in the underlying action. They base this assertion on the findings by the court in the prior action that (1) the retainer contract between Consolidated, Miller and Galande was void under the Insurance Code; (2) Consolidated accepted a payment equaling 10 percent of the total insurance proceeds as a final and total payment of their claims; and (3) Consolidated continued its lawsuit against Miller and Galande after this. We disagree.

"The doctrine of res judicata or claim preclusion dictates that in ordinary circumstances a final judgment on the merits prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. [Citation.] The doctrine of collateral estoppel or issue preclusion prevents 'the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action.' [Citation.] 'Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action.' "

(*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 844.)

The underlying action did not resolve the element of malice. That the prior lawsuit was based on a contract found to violate the Insurance Code, and that defendants were found to have continued to pursue their claim after they had received an amount equal to 10 percent of the settlement, does not mean that the previous court necessarily found they acted with malice. In *Starkweather v. Eddy* (1930) 210 Cal. 483, 487–490, a malicious prosecution action arising from an unsuccessful attempt to prosecute the plaintiff for assault with a deadly weapon, the court reversed a judgment in favor of the defendants after concluding the court as the trier of fact had made several findings that were unsupported by the evidence. Among the court's errors was giving binding effect to a prior judgment in a quiet title action that established the plaintiff was not on the land lawfully; even assuming that prior judgment was binding on the issue of whether he was trespassing, "how that fact could be conclusive on the issue of whether the defendant acted without malice and with probable cause in charging the plaintiff with an assault with a deadly weapon, does not appear. To state the proposition is to answer it. Any such theory was and is incorrect." (*Id*. at p. 489.) As in *Starkweather*, the prior suit did not address malice and cannot be given preclusive effect on that issue.

In *Aronow v. LaCroix* (1990) 219 Cal.App.3d 1039, 1049–1053, by contrast, the court properly gave preclusive effect to a prior lawsuit in which it was found that a party acted without malice in bringing the prior action. The prior judgment resolved the same specific issue that was presented in the litigation before the court. Here, defendants' malice (or lack thereof) was not litigated or resolved in the underlying proceeding.

The trial court did not err in finding that defendants acted without malice in bringing the former suit. The evidence supported the court's determination of this element and it was not required to find to the contrary based on principles of res judicata or collateral estoppel.

III. DISPOSITION

The judgment is affirmed. Costs to defendants/respondents.

NEEDHAM, J.

We concur.

SIMONS, Acting P.J.

BURNS, J.